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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 JIM MAXWELL and KAY MAXWELL,
11 individually and as guardians of
12 TREVER ALLEN BRUCE and KELTEN
13 TANNER BRUCE; and JIM
14 MAXWELL, as executor of the ESTATE
15 OF KRISTIN MARIE MAXWELL-
16 BRUCE,

17 Plaintiffs,

18 v.

19 COUNTY OF SAN DIEGO; ALPINE
20 FIRE PROTECTION DISTRICT;
21 VIEJAS FIRE DEPARTMENT;
22 DEPUTY LOWELL; BRYAN "SAM"
23 BRUCE; DOES 1-50.

24 Defendants.

Civil No. 07cv2385 JAH(WMc)

**ORDER (1) GRANTING
DEFENDANT VIEJAS FIRE
DEPARTMENT'S MOTION TO
DISMISS [DOC. # 12]; (2)
DENYING DEFENDANT ALPINE
FIRE PROTECTION DISTRICT'S
MOTION TO DISMISS [DOC. # 3];
AND (3) GRANTING IN PART
AND DENYING IN PART
DEFENDANT COUNTY OF SAN
DIEGO'S MOTION TO DISMISS
[DOC. # 5]**

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26
27 **INTRODUCTION**

28 Pending before this Court are the motions to dismiss filed by defendant Viejas Fire Department ("Viejas Fire"), defendant Alpine Fire Protection District ("Alpine Fire" or "Alpine") and defendant County of San Diego ("the County"). The motions have each been fully briefed by the parties. After a careful consideration of the pleadings and relevant exhibits submitted by the parties, and for the reasons set forth below, this Court GRANTS Viejas Fire's motion; DENIES Alpine Fire's motion; and GRANTS IN PART and DENIES IN PART the County's motion.

BACKGROUND

1. Factual Background

The instant complaint stems from the shooting and subsequent death of Kristin Marie Maxwell-Bruce (“the decedent”) by her husband, Sheriff’s deputy Lowell Bryan “Sam” Bruce (“Bruce”) on December 14, 2006, at the family home shared by Bruce and the decedent, their children Trever Allen Bruce and Kelten Tanner Bruce (“the children”), and the decedent’s parents, Jim and Kay Maxwell (“the Maxwells,” “the grandparents” or “plaintiffs”), who are the owners of the home. Compl. ¶¶ 1, 31. The complaint alleges that, although the decedent was shot in the jaw, she was able to walk to the telephone and dial 911. Id. ¶¶ 3, 32. According to plaintiffs, when the County’s sheriff’s deputies responded to the 911 call, the scene “quickly became a scene of chaos and disorder under the direction and control of the Sheriff’s Department after Sheriff’s Deputies learned one of their own was the shooter.” Id. ¶ 3. Plaintiffs allege that the scene was then locked down and the decedent was not allowed to be taken to the hospital resulting in the decedent’s death at the scene, occurring approximately one hour after the 911 call was made, by “suffocat[ing] and drown[ing] in her own blood.” Id.

The complaint alleges plaintiffs were not allowed to see, speak or comfort the decedent, or see, speak or comfort each other during the period of time that elapsed between the 911 call and the decedent’s death. Id. ¶ 37. The complaint further alleges that an unknown sheriff’s deputy hit Jim Maxwell with a baton and pepper-sprayed him in the face when he tried to reach his wife. Id. ¶¶ 37, 67, 72. The Maxwells claim they did not learn of their daughter’s death until after the news media had reported it and aver that the defendants lead the news media to believe Jim Maxwell was a suspect in the shooting. Id. ¶¶ 3, 37, 78, 84. In addition, the complaint alleges the County hired Bruce as a Deputy Sheriff even after he had failed a psychological examination twice, and allowed him to take his “County-issued weapon” home although “he was unfit for duty and prone to violence.” Id. ¶ 2, 18, 29.

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1 **2. Procedural History**

2 The instant complaint was filed on December 19, 2007, alleging causes of action
3 against the County pursuant to 42 U.S.C. § 1983, based on deprivation of plaintiffs' rights
4 to familial relationships under the Fourth and Fourteenth Amendments to the United
5 States Constitution (first cause of action) and for negligent hiring practices pursuant to
6 Monell v. New York City Department of Social Services, 436 U.S. 658, 691-94
7 (1978)("Monell"), along with various state law claims based on allegations of wrongful
8 death, survival action, excessive force, battery, intentional infliction of emotional distress,
9 and negligent infliction of emotional distress. The complaint alleges Viejas Fire and Alpine
10 Fire participated in the events that resulted in the decedent's wrongful death, giving rise
11 to the state law claims against them, with the exception of the claims for excessive force
12 and battery that are directed solely at the County.

13 Alpine Fire's and the County's motions to dismiss were both filed on January 10,
14 2008. Viejas Fire's motion was filed on January 24, 2008. Plaintiffs' oppositions to
15 Alpine Fire's and the County's motion were filed on February 5, 2008, and their
16 opposition to Viejas Fire's motion was filed on February 15, 2008. Reply briefs by Alpine
17 Fire and the County were filed on February 12, 2008, and the reply by Viejas Fire was
18 filed on February 25, 2008. After review of the pleadings submitted, this Court took the
19 motions under submission without oral argument. *See* CivLR 7.1(d.1); Docs. # 17, 20.

20 **DISCUSSION**

21 Viejas Fire and Alpine Fire each move to dismiss the complaint pursuant to
22 Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter
23 jurisdiction. Viejas Fire moves on the grounds that the doctrine of tribal sovereign
24 immunity bars plaintiffs' suit against it. Alpine Fire separately moves on the grounds that
25 supplemental jurisdiction over the state law claims should not be exercised because the
26 state law claims do not arise from the same common nucleus of operative facts as those
27 alleged for the federal claims. The County moves to dismiss the first, second, third and
28 fourth causes of action, and certain claims alleged in the eighth and ninth causes of action

1 for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6)
 2 of the Federal Rules of Civil Procedure. The County also moves for a more definite
 3 statement, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure as to other
 4 claims presented in the eighth and ninth causes of action.

5 **1. Legal Standards**

6 **a. Subject Matter Jurisdiction [Fed.R.Civ.P. 12(b)(1)]**

7 **i. In General**

8 “A motion to dismiss for lack of subject matter jurisdiction may either attack the
 9 allegations of the complaint or may be made as a ‘speaking motion’ attacking the existence
 10 of subject matter jurisdiction in fact.” Thornhill Publishing Co. v. General Tel & Elect.,
 11 594 F.2d 730, 733 (9th Cir. 1979); *see also* Fed. R. Civ. P. 12(b)(1). “Unlike a Rule
 12 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint’s
 13 jurisdictional allegations despite their formal sufficiency, and in doing so rely on affidavits
 14 or any other evidence properly before the court.” St. Clair v. City of Chico, 880 F.2d 199,
 15 201 (9th Cir. 1989). Thus, the existence of disputed material facts will not preclude the
 16 trial court from evaluating for itself the merits of jurisdictional claims. Id.

17 Where the defendant brings the motion as a “speaking motion” presenting a factual
 18 challenge to subject matter jurisdiction, the Court may consider extrinsic evidence on
 19 whether jurisdiction exists and may resolve factual disputes if necessary. Thornhill, 594
 20 F.2d at 733. Because the plaintiff bears the burden of establishing subject matter
 21 jurisdiction, no presumption of truthfulness attaches to the allegations of plaintiff’s
 22 complaint and the Court must presume it lacks jurisdiction until plaintiff establishes
 23 jurisdiction. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.
 24 1989).

25 **ii. Tribal Sovereign Immunity**

26 “Suits against Indian tribes are ... barred by sovereign immunity absent a clear
 27 waiver by the tribe or congressional abrogation.” Oklahoma Tax Comm'n v. Citizen Band
 28 Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); Snow v. Quinault Indian Nation,

709 F.2d 1319, 1321 (9th Cir.1983). Tribal sovereign immunity deprives a court of subject matter jurisdiction. *See Pit River Home & Ag. Coop. Ass'n v. United States*, 30 F.3d 1088, 1102-03 (9th Cir.1994); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir.1989). “There is a strong presumption against waiver of tribal sovereign immunity.” *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). Waiver of sovereign immunity by a tribe must be unequivocally expressed and may not be implied. *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir.1996); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir.1994); *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir.1989); *Snow*, 709 F.2d at 1321. Similarly, congressional abrogation of sovereign immunity may not be implied and must be “unequivocally expressed” in “explicit legislation.” *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir.2003); *Demontiney*, 255 F.3d at 811. Plaintiffs bear the burden of demonstrating there was an express and unequivocal waiver of tribal sovereign immunity. *See Baker v. United States*, 817 F.2d 560, 562 (9th Cir.1987); *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 2007 WL 2701995 *2 (D.Colo.2007). Absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress, tribes cannot be sued. *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1398 (9th Cir.1993).

Tribal sovereign immunity applies in both federal and state courts. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 68 (1978); *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 171-73 (1977); *Snow*, 709 F.2d at 1321; *United States v. Oregon*, 657 F.2d 1009, 1012-13 (9th Cir.1981). “The immunity ... extends to suits for declaratory and injunctive relief,” and “is not defeated by an allegation that [the tribe] acted beyond its powers.” *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir.1991). Tribal sovereign immunity is not dependent on a distinction between on-reservation and off-reservation conduct nor upon a distinction between the governmental and commercial activities of a tribe.. *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 754-55, 759-60 (1998); *Allen v. Gold Country Casino*, 464 F.3d 1044,

1 1046 (9th Cir.2006); American Vantage Cos. v. Table Mt. Rancheria, 292 F.3d 1091,
 2 1100 (9th Cir.2002); Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357 (2d
 3 Cir.2000). A tribe's sovereign immunity extends both to tribal governing bodies and to
 4 tribal agencies which act as an arm of the tribe. *See Allen*, 464 F.3d at 1046; *see also*
 5 Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 978 (9th Cir.2006); Pink v. Modoc
 6 Indian Health Project, 157 F.3d 1185, 1188 (9th Cir.1998). Thus, it is irrelevant whether
 7 the particular tribal entity is conducting business activities because the appropriate
 8 question is whether the particular "entity acts as an arm of the tribe so that the entity's
 9 activities are properly deemed to be those of the tribe." Allen, 464 F.3d at 1046.

10 **iii. Supplemental Jurisdiction**

11 Under 28 U.S.C. § 1367, a district court may exercise supplemental jurisdiction
 12 over state law claims that "form part of the same case or controversy under Article III of
 13 the United States Constitution." 28 U.S.C. § 1367(a). The "[s]ame case or controversy"
 14 is defined as multiple claims that arise from "a common nucleus of operative facts" that
 15 a plaintiff "would ordinarily be expected to try ... all in a single judicial proceeding."
 16 United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). However, 28
 17 U.S.C. § 1367(c)(2) explicitly allows a reviewing court to decline to exercise supplemental
 18 jurisdiction if:

- 19 (1) the claim raises a novel or complex issue of State law,
- 20 (2) the claim substantially predominates over the claim or claims over which the
- 21 district court has original jurisdiction,
- 22 (3) the district court has dismissed all claims over which it has original jurisdiction,
- or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

23 28 U.S.C. §§ 1367(c)(1)-(4). Thus, it is well within a court's discretion to exercise, or
 24 decline to exercise supplemental jurisdiction over state law claims. Gibbs, 383 U.S. at 726;
 25 Schneider v. TRW, Inc., 930 F.2d 986, 994 (9th Cir. 1991). When deciding whether to
 26 exercise supplemental jurisdiction, a court should consider judicial economy, convenience,
 27 fairness and comity. Gibbs, 383 U.S. at 726.

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1 **b. Failure to State a Claim [Fed.R.Civ.P. 12(b)(6)]**

2 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
3 sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).
4 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal
5 theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); *see*
6 Neitzke v. Williams, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to
7 dismiss a claim on the basis of a dispositive issue of law.”). Alternatively, a complaint may
8 be dismissed where it presents a cognizable legal theory yet fails to plead essential facts
9 under that theory. Robertson, 749 F.2d at 534. While a plaintiff need not give “detailed
10 factual allegations,” he must plead sufficient facts that, if true, “raise a right to relief above
11 the speculative level.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007).

12 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
13 truth of all factual allegations and must construe all inferences from them in the light most
14 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.
15 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However,
16 legal conclusions need not be taken as true merely because they are cast in the form of
17 factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western
18 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion
19 to dismiss, the Court may consider the facts alleged in the complaint, documents attached
20 to the complaint, documents relied upon but not attached to the complaint when
21 authenticity is not contested, and matters of which the Court takes judicial notice. Lee
22 v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that
23 a complaint fails to state a claim, the court should grant leave to amend unless it
24 determines that the pleading could not possibly be cured by the allegation of other facts.
25 *See* Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

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1 **c. More Definite Statement [Fed.R.Civ.P. 12(e)]**

2 “If a pleading to which a responsive pleading is permitted is so vague or ambiguous
3 that a party cannot reasonably be required to frame a responsive pleading, the party may
4 move for a more definite statement before interposing a responsive pleading.”
5 Fed.R.Civ.P. 12(e). Rule 12(e) motions are appropriate only under limited circumstances.
6 *See* 5C Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE (Civ.
7 3d § 1376 (2004). However, when addressing a Rule 12(e) motion, “the judge may in his
8 discretion ... require such detail as may be appropriate in the particular case.” McHenry
9 v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996).

10 **2. Analysis**

11 **a. Viejas Fire’s Motion**

12 Viejas Fire moves to dismiss the instant complaint for lack of subject matter
13 jurisdiction based on the doctrine of tribal sovereign immunity. Viejas Fire explains that
14 it is an entity of the Viejas Band of Kumeyaay Indians (“the Viejas Band” or “the Band”),
15 a federally recognized Indian tribe.¹ Doc. # 12-2 at 1. Viejas Fire further explains that
16 it was established in October 2006 to assist the Viejas Band by providing fire protection
17 and emergency medical services to the Band’s 1,600 acre reservation and its surrounding
18 communities upon request. Doc. # 12-2 at 1, 3-4; Barrett Decl. ¶ 4. Viejas Fire points
19 out that it is “wholly funded by the Band” and “is not incorporated or otherwise organized
20 under the laws of any state.” Id. at 4. As such, Viejas Fire contends it is immune from
21 suit absent waiver of its sovereign immunity or abrogation by Congress of the Viejas
22 Band’s immunity. Id. at 6. Viejas Fire argues that no waiver or abrogation has occurred
23 to overcome its sovereign immunity from suit. Id.

24 In opposition, plaintiffs do not dispute that the Viejas Band is a federally
25 recognized Indian tribe subject to sovereign immunity. However, plaintiffs claim that
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27 ¹ In support, Viejas seeks judicial notice of the Federal Register listing of federally recognized tribes
28 compiled by the Bureau of Indian Affairs which includes the Viejas Band in its inventory. Doc. # 12-2 at 5;
Doc. # 12-3, Exh. A. This Court deems it appropriate to take judicial notice of the Federal Register listing
as evidence demonstrating that the Viejas Band is a federally recognized Indian tribe.

1 Viejas Fire entered into a “mutual aid agreement” with defendant Alpine Fire pursuant to
 2 California Health and Safety Code § 13863,² which plaintiff argues constitutes an
 3 unequivocal waiver of its sovereign immunity. Doc. # 18 at 3, 5-6 (citing C & L
 4 Enterprises v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 423
 5 (2001)(where Indian tribe entered into a contract with a choice of law clause, the tribe
 6 waived its sovereign immunity); Smith v. Hopland Band of Pomo Indians, 95
 7 Cal.App.4th 1 (2002)(same)).

8 Viejas Fire points out, in reply, that plaintiffs’ allegations regarding the mutual aid
 9 agreement lack any factual support and, thus, must be rejected. Doc. # 19 at 2. Viejas
 10 Fire contends that “[p]laintiffs cannot simply rely on the allegations raised in their
 11 Complaint” to defeat a motion to dismiss for lack of subject matter jurisdiction. Id.
 12 Instead, Viejas Fire contends that plaintiffs must “furnish affidavits or other evidence
 13 necessary to satisfy [their] burden of establishing subject matter jurisdiction.” Id. (citing
 14 Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). Viejas
 15 Fire claims plaintiffs have failed to meet their burden. Id.

16 This Court agrees with Viejas Fire. Plaintiffs merely allege, in their complaint and
 17 in their pleadings, that there exists a mutual aid agreement between Alpine Fire and Viejas
 18 Fire. *See* Compl. ¶¶ 59, 60; Doc. # 18 at 4-5. Plaintiffs provide no evidence to support
 19 their allegations concerning the existence of a mutual aid agreement and Viejas Fire
 20 disputes that such an agreement exists. *See* Doc. # 19 at 2, 4. Without proof of a mutual
 21 aid agreement, plaintiffs cannot meet their burden of demonstrating subject matter
 22 jurisdiction exists. Stock West, 873 F.2d at 1225. This Court, therefore, finds that
 23 Viejas Fire is entitled to tribal sovereign immunity as an entity of the Viejas Band and no
 24 waiver of immunity or abrogation by Congress has been demonstrated to have occurred
 25

26 ² Section 13863(a) provides that: “[a] district may enter into mutual aid agreements with any ...
 27 federally recognized Indian Tribe.” Section 13863(b) provides that an “Indian tribe ... shall have the same
 28 immunity from liability for civil damages on account of personal injury to or death of any person ... resulting
 from acts or omissions of its fire department personnel in the performance of the provisions of the mutual
 aid agreement as is provided by law for the district . . . except when the act or omission occurs on property
 under the control of the . . . federally recognized Indian tribe.”

1 to overcome that litigation bar.³ Accordingly, Viejas Fire's motion to dismiss for lack of
 2 subject matter jurisdiction based on tribal sovereign immunity is GRANTED and Viejas
 3 Fire is DISMISSED as a defendant in this case.

4 **b. Alpine Fire's Motion**

5 Alpine Fire moves to dismiss the complaint against it on the grounds that
 6 supplemental jurisdiction over the state law claims should not be exercised because there
 7 is no common nucleus of operative facts connecting the federal claims with the state claims
 8 alleged. *See* Doc. # 3. Alpine Fire claims that the "nucleus of facts comprising the
 9 excessive force/assault claims against the County," which are the only federal claims
 10 alleged, "are utterly unrelated to, and independent of, the nucleus of facts comprising the
 11 claims of grossly negligent emergency care rendered by the paramedics/EMTs from Alpine
 12 ..." Doc. # 3-2 at 5. According to Alpine Fire, "[t]he only relationship between the two
 13 claims is that one followed the other in time." *Id.* at 7. Alpine Fire claims that "[t]he key
 14 facts do not overlap ... for any purpose beyond providing background." *Id.*

15 Plaintiffs contend, in opposition, the complaint "clearly allege[s] that the majority
 16 of the constitutional violations alleged against the County occurred at the same time as
 17 Alpine's gross negligence, and were inextricably connected with Alpine's ... actions." Doc.
 18 # 14 at 5. Plaintiffs point out that the complaint alleges the County and Alpine each had
 19 respective roles in the alleged refusal to transport the decedent to the hospital resulting in
 20 the decedent's "asphyxiation on her own blood." *Id.* Plaintiffs note that both the County
 21 and Alpine were at the scene acting at the same time and their "combined actions [are
 22 alleged to have] caused [the decedent's] death." *Id.* (citing Compl. ¶¶ 3, 53, 54, 56, 57).
 23 Thus, plaintiffs contend that "[i]t is not possible to neatly separate Alpine's actions from
 24 the County's." *Id.* In addition, plaintiffs claim that judicial economy, convenience and
 25 fairness weigh in favor of adjudicating the claims against the County and Alpine in one

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 27 ³ Because this Court finds plaintiffs have failed to meet their burden of demonstrating subject matter
 28 jurisdiction exists by failing to prove the existence of a mutual aid agreement that might constitute a waiver
 of tribal sovereign immunity under California law, this Court does not address whether such an agreement
 constitutes a waiver in this case or Viejas Fire's alternative arguments concerning whether it is proper for this
 Court to assume supplemental jurisdiction over the claims against Viejas Fire.

1 single trial. Id. at 6-7.

2 In reply, Alpine Fire argues that the claims can, in fact, be separately easily because
3 “the claims and law applicable to the Sheriffs are clearly different from the claims and law
4 relevant to the paramedics.” Doc. # 16 at 2. Alpine Fire points out that there are simple
5 remedies that can be applied to ensure no duplication of effort or conflicting rulings will
6 occur if the claims against the County and Alpine are tried separately. Id. at 2-3.

7 This Court disagrees with Alpine. This Court is unconvinced that the claims arising
8 out the actions of both the County and Alpine during the time period between the
9 shooting and the decedent’s death are not intertwined. The complaint clearly alleges that
10 both the County’s and Alpine’s actions contributed to the injuries suffered by plaintiffs.
11 *See* Compl. ¶¶ 3, 53, 54, 56, 57. There does not appear to be any dispute that the County
12 and Alpine’s actions that spawned the instant lawsuit arise from the same set of facts.
13 Thus, this Court finds that the claims against both the County and Alpine arise out of a
14 common nucleus of operative facts. This Court also finds that the notions of judicial
15 economy, convenience, fairness and comity dictate that the claims against the County and
16 Alpine be adjudicated in one single judicial proceeding.⁴ Gibbs, 383 U.S. at 725.
17 Therefore, Alpine’s motion to dismiss for lack of subject matter jurisdiction is DENIED.

18 **c. The County’s Motion**

19 The County moves to dismiss plaintiffs’ first second, third and fourth causes of
20 action and certain claims contained in plaintiffs’ eighth and ninth causes of action for
21 failure to state a claim upon which relief may be granted. Specifically, the County seeks
22 dismissal on the grounds that (1) the Maxwells lack standing to sue on their own behalf
23 for wrongful death under Section 1983; (2) the County cannot be held liable (a) because
24 Bruce did not act under color of state law; (b) because it cannot be held accountable for
25 negligently hiring and providing a gun to a person with psychological problems under
26

27 ⁴ This Court notes Alpine has indicated that, if the instant motion is denied, it may, at some later
28 date, seek to bifurcate the trial so the claims against it could be tried separately from the claims against the
County. *See* Doc. # 3-2 at 2. This ruling in no way precludes Alpine from seeking such a bifurcation at a
later time.

1 either federal or state law; and (c) it cannot be held accountable under a danger-creation
 2 or special relationship theory based on federal or state law. In addition, the County seeks
 3 a more definite statement on plaintiffs' claims for intentional and negligent infliction of
 4 emotional distress.⁵

5 1. Standing

6 The County contends that the Maxwells "have no claim in their own rights under
 7 the first cause of action" based on deprivation of the Maxwells' right to familial
 8 relationship with the decedent under the Fourth and Fourteenth Amendments to the
 9 United States Constitution. Doc. # 5-2 at 22 (citing Smith v. City of Fontana, 818 F.3d
 10 1411 (9th Cir. 1987); Estate of Johnson v. Village of Libertyville, 819 F.3d 174 (7th Cir.
 11 1987)); *see* Compl. ¶ 41. Plaintiffs point out, in opposition, that the Maxwells' standing
 12 is based on an alleged deprivation of their own familial relationship with the decedent, a
 13 claim plaintiffs argue can be properly asserted here. Doc. # 13 at 5-6 (citing Doty v.
 14 Carey, 626 F.Supp. 359 (N.D.Ill. 1986)(allowing parents to bring Section 1983 claim on
 15 their own behalf despite not being proper plaintiffs under Illinois' wrongful death statute);
 16 Penilla v. City of Huntington Park, 115 F.3d 707, 711 (9th Cir. 1997)(parent could
 17 pursue Fourteenth Amendment claim in her own right based on deprivation of familial
 18 relationship with son); Munger v. City of Glasgow, 227 F.3d 1082 (9th Cir.
 19 2000)(parents sued individually and on behalf of decedent son's estate for constitutional

21 ⁵ The County also presents a lengthy discussion concerning an alleged "incurable conflict of interest"
 22 that the County claims exists between the grandparents and the children plaintiffs, suggesting that the
 23 children could, based on the facts alleged in the complaint, sue their grandparents under similar theories to
 24 those alleged against the County. *See* Doc. # 5-2 at 11-14. The County contends the conflict exists on both
 25 a personal representative level, since the grandparents personally represent the interests of the children and
 26 the decedent's estate, as well as on a legal representation level, in that plaintiffs' counsel represent all parties
 27 with conflicting interests. *Id.* at 13. The County worries "that issues already raised in the complaint will not
 28 be thoroughly litigated against all parties while the conflict exists" and, thus, requests the Court "exercise
 its inherent power to protect vulnerable parties who cannot safeguard their own rights." *Id.* at 14. Plaintiffs
 contend in opposition, that the conflicts defendants point to are not actual conflicts but, instead, are merely
 potential conflicts which are, nevertheless, "patently frivolous." Doc. # 13 at 20. Plaintiffs point out that
 the cases cited by defendants involved actual conflicts, not potential ones. *Id.* at 21. This Court, however,
 notes that defendants do not expressly seek dismissal based on this alleged "incurable conflict," simply
 suggesting this Court "exercise its inherent power to protect" the children plaintiffs from possible harm. Doc.
 # 5-2 at 14; Doc. # 15 at 3. This Court finds the instant motion is not the proper avenue to seek such relief.
 Therefore, this Court deems it inappropriate to address this issue here.

1 violations against county sheriff's department and police department)).

2 The County, in reply, concedes that the Maxwells have standing to assert their own
3 personal Fourth Amendment "death-based claims," if they have any such claims, but notes
4 that "it is problematic" because the Supreme Court has left open the question of whether
5 parents of a middle-aged adult child who is married with children can assert a Fourth
6 Amendment claim for loss of their familial relationship. Doc. # 15 at 5-6. Thus, the
7 County states that "[a]t this juncture, [it] merely preserves its rights and objections"
8 regarding the standing issue. *Id.* at 6. This Court construes the County's representations
9 as withdrawing this contention but preserving its rights and objections to readdress its
10 concerns, if necessary, at some later date. Accordingly, the County's motion to dismiss the
11 Maxwells' first cause of action based on lack of standing is WITHDRAWN.

12 2. The County's Liability

13 The County next moves to dismiss plaintiffs' Section 1983 claims on the grounds
14 that (a) the County cannot be held liable because Bruce was not acting under color of state
15 law; (b) the County cannot be held liable for negligently hiring or providing Bruce with
16 a gun; and (c) the County cannot be held liable under a danger-creation or special
17 relationship theory.

18 a. Acting under Color of State Law

19 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute,
20 ordinance, regulation, custom, or usage, of any State or Territory or the District of
21 Columbia, subjects, or causes to be subjected, any citizen of the United States or other
22 person within the jurisdiction thereof to the deprivation of any rights, privileges, or
23 immunities secured by the Constitution and laws, shall be liable to the party injured in an
24 action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.
25 The County argues that it cannot be held liable for Bruce's actions because Bruce was not
26 acting under color of state law at the time of the shooting. Doc. # 5-2 at 14.

27 In opposition, plaintiffs point out that the County "simply ignore[s] the acts of
28 County employees, other than Bruce, who are alleged to have caused [the decedent's]

1 death.” Doc. # 13 at 6. Plaintiffs point out that the complaint specifically alleges “after
 2 [the decedent] called 911 for help, the San Diego Sheriff’s Department responded, but the
 3 scene of the shooting quickly became a scene of chaos and disorder ‘under the direction
 4 and control of the Sheriff’s Department ...” Id. (quoting Compl. ¶ 3)(emphasis omitted).
 5 Plaintiffs further point out that the complaint alleges “sheriff’s deputies, acting under color
 6 of state law and within the scope of their employment, caused [the decedent’s] death by
 7 locking down the scene of the shooting, by seizing [the decedent] and taking custody of
 8 her, by refusing to allow [her] to be taken to the hospital, by refusing to allow [the
 9 Maxwells] to attend to [her], by performing emergency medical services in a grossly
 10 negligent manner and by deliberate indifference to her obvious medical needs.” Id. at 7
 11 (citing Compl. ¶¶ 3, 4, 35, 36, 37, 38, 41). The County notes, in reply, that plaintiffs’
 12 complaint contains no allegations concerning the decedent being taken into custody or
 13 seized but, instead, alleges only that the Maxwells “were ‘unlawfully detained and falsely
 14 imprisoned’ and ‘restrained.’” Doc. # 15 at 4 (citing Compl. ¶ 37)(emphasis omitted).

15 The complaint alleges, in pertinent part, as follows:

16 Sheriff’s Deputies locked down the scene of the shooting and refused to let
 17 [the decedent] be taken to the hospital . . . During the last hour of [the
 18 decedent’s] life, Defendants refused to let her parents see her [and] refused
 19 to let them speak to her or comfort her . . . Sheriff’s Department employees
 20 . . . – all acting within the course and scope of their employment as
 emergency medical services providers – caused [the decedent’s] death by
 performing medical services, including but not limited to first aid, medical
 treatment, rescue procedures, transportation, and other necessary and related
 activities in a grossly negligent manner.

21 Compl. ¶¶ 36-37. These allegations, in this Court’s view, clearly state a claim for injury
 22 caused by the County by County employees acting under color of state law. Therefore,
 23 this Court finds that, although it is clear that Bruce was not acting under color of state
 24 law, other County employees were clearly so acting. Accordingly, the County’s motion
 25 to dismiss is GRANTED as to the County’s liability based on Bruce’s actions but DENIED
 26 insofar as it seeks dismissal based on the actions of other County employees.

27 //

28 //

b. Negligent Hiring and Providing a Gun

The County also contends that it cannot be held liable under Section 1983 for negligently hiring and providing a gun to Bruce⁶ even if the County knew of his psychological problems. Doc. # 5-2 at 14. According to the County, the instant case is analogous to the case of Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997), in which the Supreme Court determined that, for the County to be held liable under Section 1983 for negligently hiring Bruce and providing him with a gun, plaintiffs must demonstrate that the shooting was “a plainly obvious consequence of the hiring decision.” Id. at 16 (quoting Brown, 520 U.S. at 412). The County points out that the complaint “affirmatively alleges in great detail that Mr. Bruce already had psychological issues before the County hired him” and argues that “[h]e would have had the same issues whether or not the County hired him.” Id. Thus, the County contends there is no direct link between the alleged deficiencies, that is, the County’s screening process for hiring purposes, and the alleged constitutional violation, in this case, the shooting and death of the decedent. *See id.*

In opposition, plaintiffs point out that their claims are not predicated solely on the negligent hiring of Bruce or providing him with a weapon but, instead, include allegations of gross negligence which subject the County to vicarious liability for the actions of its employees acting within the scope of their employment.⁷ Doc. # 13 at 16. However, as the County notes in reply, plaintiffs fail to address the Brown decision and its impact on plaintiffs’ claims.⁸ *See* Doc. # 15 at 6. The County contends plaintiffs’ allegations in the second cause of action, as well as the general factual allegations concerning the County’s

⁶ In the second cause of action, plaintiffs seek to hold the County liable for its “reckless hiring policies and practices” that resulted in the hiring of Bruce as a deputy and providing him with a gun based on Monell liability. *See* Compl. ¶¶ 45-47; Doc. # 13 at 14.

⁷ These allegations are found in plaintiffs’ third and fourth causes of action. *See* Compl. ¶¶ 53-54, 56-57.

⁸ Plaintiffs’ only argument in response to the County’s contentions regarding supervisory liability center on whether the County was acting on behalf of the state or the county during the incident at issue. *See* Doc. # 13 at 14-15. However, this Court’s reading of the pleadings reflects that this issue was not presented by the County in its motion. Therefore, this Court does not address it.

1 hiring of Bruce and providing him with a gun, center on the “hiring-policy type of liability”
 2 that was precluded in Brown. Id. (citing Compl. ¶¶ 17-30, 45-47, 49).

3 Based on a careful review of the case authority cited, this Court finds plaintiffs’
 4 claims that the County negligently hired Bruce and provided him with a gun are
 5 insufficient to state a Section 1983 claim under Monell, 436 U.S. at 691-94. *See* Brown,
 6 520 U.S. at 412. There appears to be no dispute that Brown bars plaintiffs from seeking
 7 relief based on a negligent hiring theory because causation cannot be established under the
 8 facts of this case.⁹ Therefore, the County’s motion to dismiss plaintiffs’ second cause of
 9 action and any general allegations concerning negligent hiring and providing Bruce with
 10 a gun is GRANTED.

11 c. Danger-Creation/ Special Relationship Theories

12 The County next moves to dismiss plaintiffs’ claims for wrongful death and survival
 13 action under California law, contained in plaintiffs’ third and fourth causes of action, on
 14 the grounds that the County is not liable under a danger-creation or special relationship
 15 theory. Doc. # 5-2 at 19-22 (citing, *inter alia*, Davidson v. City of Westminster, 32 Cal.3d
 16 197 (1982); Williams v. State of California, 34 Cal.3d 18 (1983)). In Davidson, the
 17 California Supreme Court explained that:

18 As a general rule, one owes no duty to control the conduct of another, nor
 19 to warn those endangered by such conduct. Such a duty may arise, however,
 20 if ‘(a) a special relation exists between the actor and the third person which
 21 imposes a duty upon the actor to control the third person’s conduct, or (b)
 a special relation exists between the actor and the other which gives the other
 a right to protection.

22 Davidson, 32 Cal.3d at 203 (citations omitted). However, in regards to police officers’
 23 liability, the Davidson court found that the “mere proximity” of a person to someone
 24 officers know or suspect is a threat does not establish a special relationship imposing a
 25 duty on the officers to control that threat. Id. at 205. In Williams, the California
 26

27 ⁹ The County also contends that it cannot be held liable under California law on a negligent hiring
 28 or negligent supervision theory. *See* Doc. # 5-2 at 15-19 (citing de Villers v. County of San Diego, 156
 Cal.App.4th 238, 244-245 (2007)). However, because plaintiffs concede their “state law causes of action ...
 are not predicated on ‘providing a gun’ or negligently hiring a killer,” this Court need not address this issue.

1 Supreme Court expounded on this rule, explaining that a person, including a law
2 enforcement officer, who does not create the peril has no duty to come to the aid of
3 another may still be held liable if, by aiding another “his failure to exercise such care
4 increases the risk” of harm or “the harm is suffered because of the other’s reliance upon
5 the undertaking.” Williams, 34 Cal.3d at 23-24. In other words, the County may be held
6 liable under Williams if its employees came to the aid of the decedent but then failed to
7 exercise the proper care or simply failed to act to the decedent’s detriment. The County
8 argues that, here, the duty was not triggered here. Doc. # 5-2 at 22.

9 In opposition, plaintiffs contend that, “[b]y locking down the scene, by refusing to
10 let [the decedent] be taken to the hospital, and by affirmatively undertaking to provide
11 emergency medical services, sheriff’s deputies created a ‘special relationship’ under
12 California [s]tate law and situation of dependency resulting in detrimental reliance.” Doc.
13 # 13 at 17. Thus, plaintiffs argue that, under the circumstances here, the County created
14 a “special relationship” that gave rise to a duty of care because sheriff’s deputies are alleged
15 to have taken affirmative actions at the scene, noting that “there may be a duty to refrain
16 from conduct which prevents others from giving assistance.” Id. at 18-19 (citing Clemente
17 v. State of California, 40 Cal.3d 202 (1985)). Plaintiffs claim the County did just that,
18 “by refusing to allow [the decedent] to be taken to the hospital, and by refusing to allow
19 [the Maxwells] to attend to [the decedent].” Id. at 18.

20 The County claims, in reply, that the California Supreme Court has disapproved
21 the notion that a special relationship may arise solely from the fact of dependency. *See*
22 Doc. # 15 at 8 (citing Williams, 34 Cal.3d at 26-28 n. 9). The County also claims
23 plaintiffs have cited no authority to support their theory concerning the “potential ‘duty
24 to refrain from conduct which prevents others from giving assistance’ ... in the context of
25 official responses to serious medical emergencies.” Id. The County points out that the
26 special relationship liability under California law is narrow and “is not triggered ‘simply
27 because police officers responded to a call for assistance and took some action at the
28 scene.’” Id. at 9 (quoting Adams v. City of Fremont, 68 Cal.App.4th 243, 279 (1998)).

In ruling on a motion to dismiss under Rule 12(b)(6), this Court must view the allegations presented in the light most favorable to plaintiffs. Thompson, 295 F.3d at 895; Cahill, 80 F.3d at 337-38. Thus, this Court cannot, at this stage of the proceedings, view plaintiffs' allegations as narrowly as the County seeks. Plaintiffs' complaint clearly alleges "Sheriff's Deputies locked down the scene and refused to let [the decedent] be taken to the hospital" and that defendants, including the County's sheriff's deputies, "refused to let [the Maxwells] see, speak or comfort her." Compl. ¶¶ 36, 37. Viewing these allegations in plaintiffs' favor, this Court finds the complaint sufficiently alleges the County's employees took more than just "some action at the scene," Adams, 68 Cal.App.4th at 279, thereby triggering a special relationship between the County and the decedent. Therefore, this Court finds the County's arguments fail. Accordingly, the County's motion to dismiss plaintiffs' state law claims contained in the third and fourth causes of action for failure to state a claim under a danger-creation or special relationship theory is DENIED.

3. More Definite Statement

Lastly, the County moves for a more definite statement as to plaintiffs' claims presented in the eighth and ninth causes of action for intentional and negligent infliction of emotional distress.¹⁰ See Doc. # 5-2 at 25. The County claims the complaint "lump[s] all other allegations [besides those that allege the decedent's suffering and death and excessive force] together[]" which prevents the County from "determin[ing] which claims are directed at the County ... and [from] identify[ing] events or circumstances from which those claims arise sufficient to formulate a meaningful answer." Id. As examples, the County points to plaintiffs' allegations that "[d]efendants' incompetence or arrogance even caused the news media to believe Jim was a 'suspect'" and "Kristin's young boys were also

¹⁰ The County also moves to dismiss those portions of these two causes of action that "seek to hold the County liable for inflicting emotional distress by causing the wife's suffering and death" based on the arguments presented previously for the first through fourth causes of action. Doc. # 5-2 at 24-25. Because this Court denies the County's motion as it relates to all of plaintiffs' allegations in the first through fourth causes of action, with the exception of the allegations concerning negligent hiring which is not addressed in the eighth and ninth causes of action, the County's motion to dismiss portions of plaintiffs' eighth and ninth causes of action on the previously presented bases must be DENIED as well.

1 mistreated by defendants.” Id. (citing Compl. ¶ 37). Plaintiffs disagree, contending the
 2 allegations are clear enough to allow the County to admit or deny the allegations, in that
 3 the allegations contain enough information to notify the County of the claims against it.
 4 Doc. # 15 at 22.

5 This Court’s review of the complaint reveals that plaintiffs are correct. Although
 6 the complaint is certainly not precise, in that some of the allegations contained in the
 7 eighth and ninth causes of action could be attributed to any one of the defendants or all
 8 of them, there is no reason for the County not to assume the allegations presented do not
 9 apply to it. As such, the County could admit or deny these imprecise allegations whether
 10 or not they are applicable to a different defendant. This Court finds plaintiffs’ complaint
 11 is not “so vague or ambiguous that [the County] cannot reasonably be required to frame
 12 a responsive pleading,” requiring a more definite statement under Rule 12(e).
 13 Fed.R.Civ.P. 12(e). Accordingly, the County’s motion for a more definite statement is
 14 DENIED.¹¹

15 CONCLUSION AND ORDER

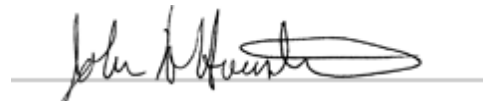
16 Based on the foregoing, IT IS HEREBY ORDERED that:

- 17 1. Viejas Fire’s motion to dismiss [doc. # 12] is **GRANTED** and Viejas Fire is
 18 **DISMISSED** as a defendant in this case;
- 19 2. Alpine Fire’s motion to dismiss [doc. # 3] is **DENIED**;
- 20 3. The County’s motion to dismiss [doc. # 5] is **GRANTED IN PART** and
 21 **DENIED IN PART** as follows:
 - 22 a. The County’s motion to dismiss the Maxwell’s claims in plaintiffs’
 23 first cause of action for lack of standing is **WITHDRAWN**;

24
 25
 26 ¹¹ Plaintiffs, in their opposing brief to the County’s motion, seeks leave of court to file an amended
 27 complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, which requires leave of court to
 28 amend once a responsive pleading has been filed. *See* Doc. # 13 at 23-24; Fed.R.Civ.P. 15(a)(2). However,
 no responsive pleading has yet been filed in this case and, therefore, plaintiffs may amend as a matter of
 right. *See Doe v. United States*, 58 F.3d 494, 497 (1995)(motion to dismiss not responsive pleading within
 the meaning of Rule 15(a)); Fed.R.Civ.P. 15(a)(1). Therefore, this Court need not address plaintiffs’ request.

- 1 b. The County's motion to dismiss plaintiffs' Section 1983 claim in
2 plaintiffs' first cause of action is **GRANTED** as to the County's
3 liability based on the actions of Bruce and **DENIED** insofar as it seeks
4 dismissal based on the actions of other County employees;
5 c. The County's motion to dismiss plaintiffs' Section 1983 claims based
6 on a negligent hiring theory in plaintiffs' second cause of action is
7 **GRANTED**;
8 d. The County's motion to dismiss the state law claims in plaintiffs'
9 third and fourth causes of action based on failure to state a claim
10 under a danger-creation or special relationship theory is **DENIED**;
11 e. The County's motion to dismiss portions of plaintiffs' eighth and
12 ninth causes of action based on failure to state a claim is **DENIED**;
13 and
14 f. The County's motion for more definite statement as to plaintiffs'
15 eighth and ninth causes of action is **DENIED**.

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17 Dated: June 3, 2008

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19 JOHN A. HOUSTON
20 United States District Judge
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